Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

ELGIE L. LONG, *et al.*,

*Petitioners,*

v.

CROSS REPORTING SERVICES, INC., *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The Missouri Court Of Appeals Western District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the United States Constitution allows a state court to deny access to the courts to enforce legal and constitutional rights against a state judge.

## PARTIES BELOW

Appellants:

Elgie L. Long, Sr., father of decedent
Willie A. Long, mother of decedent
Elgie L. Long, Jr., brother of decedent
Albert W. L. Moore, Jr., lawyer for the Longs

Respondents:

Funeral Directors Service, Inc., dismissed voluntarily
Cari Franke Walsh, dismissed voluntarily
Honorable William Stephen Nixon, Judge, dismissed on pleadings

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## CITATION OF REPORT OF OPINION ENTERED IN THE CASE

The opinion below is reported at 103 S.W.3d 249 (Mo.App.W.D. 2003) under the style of *Long v. Cross Reporting Service, Inc.* (Appendix A-1).

## JURISDICTION

The Missouri Court of Appeals entered its opinion on the twenty-fifth day of February 2003; it denied rehearing or transfer to the Missouri Supreme Court on the first day of April 2003 (Appendix A-1). The Supreme Court of Missouri denied Petitioners' application to transfer on the twenty-seventh day of May 2003 (Appendix A-1, A-46). This Court has jurisdiction under 28 U.S.C. § 1257(a), which provides that the Court may review by writ of *certiorari* final judgments or decrees rendered by the highest court of a State in which a decision could be had "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

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United States Code

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Revised Statutes of Missouri

§ 1.090

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§ 191.657

## STATEMENT OF THE CASE

This action was brought to vindicate the Longs' constitutional right to privacy. Originally, the Longs, parents and brother of decedent, sued for the recovery of damages for breach of the right of sepulcher, misdelivery of a bailed item (the decedent's treasured Rolex watch, taken with his body for funeral preparation) conversion and negligent entrustment (*Long v. Funeral Directors Service*, 96 S.W.3d 885 (Mo.App.W.D. 2002)).

Funeral Directors Service, Inc. ("Funeral Directors") through their counsel Cari Franke Walsh ("Walsh") propounded discovery to elicit information about the decedent's HIV status. The Longs pointed out that such material was wholly irrelevant and immaterial to the issues raised in the pleadings and violated the Longs' constitutional right of privacy. Funeral Directors argued that HIV status went to the intent to take a watch from an infected body. Such intent, however, is immaterial to the original action, which dealt only with the questions of

whether Funeral Directors gained possession of the watch, was negligent in entrusting it to another, and failed to return it upon demand.

The Longs sought relief from the trial court's order to them to consent to the disclosure of confidential HIV information. They pointed out that Missouri RSMo §§ 191.650, 191.656, and 191.657 (the "Statute", at Appendix A-50) prohibited the disclosure of the information sought. The Longs pointed out further that, even in the absence of the Statute, it was incumbent upon courts to balance the constitutional right of privacy against the value of the discovery sought, as laid out by the Supreme Court of Florida in *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987) and by the United States Court of Appeals, Third Circuit, in *Marcella v. Brandywine Hospital*, 47 F.3d 618 (3rd Cir. 1995). The Longs did not seek to prevent discovery, only to have any confidential HIV information redacted. Walsh and Funeral Directors were focused on the discovery of confidential HIV information, whether competent or not, to damage the Longs.

After the trial court rejected the Longs' entreaties and ordered them to consent to the release of the decedent's medical records, Funeral Directors sought and elicited confidential HIV related testimony in deposition. The Longs then filed the instant action, *Long v. Cross*, for a temporary restraining order against the court reporting service that took the deposition. When more depositions were threatened, for more loose talk about the decedent's HIV status, the action was amended to pray the restraint against further disclosure of the HIV related testimony in violation of the constitutional right of privacy and the Statute. New defendants were added, including Funeral

Directors, Walsh and the Honorable William Stephen Nixon (the "Judge").

The Longs sought relief on constitutional grounds and as authorized by the Statute against those who possessed, might possess in the near future, disclosed or threatened to disclose or caused or might cause disclosure in future, of confidential HIV information in violation of constitutional safeguards and the Statute.

The trial court dismissed the Longs' petition as against the Judge. The Longs then dismissed all parties other than the Judge to make an appealable final judgment, but the trial court retained Funeral Directors Service, Inc., and Cari Franke Walsh, Esq., to hear their motion for sanctions. The trial court then imposed a devastating fine of more than $20,000.00 on the Longs' counsel, Albert W. L. Moore, Jr. ("Moore") for bringing the action (Appendix A-4).

The Longs and Moore moved to reconsider the judgments of dismissal and sanctions in light of the trial court's breach of due process, violation of the right of privacy, denial of access to the courts, imposition of excessive fines, and denial of equal protection, citing, among others, *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930), the Fifth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment thereto, *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970), *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *Bush v. Gore*, 531 U.S. 98 (2000), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001), *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987), *Marcella v. Brandywine*

*Hospital*, 47 F.3d 618 (3rd Cir. 1995) and *Pulliam v. Allen*, 466 U.S. 522 (1984). Thereafter at all levels Moore and the Longs reasserted their constitutional rights to prevent the invasion of constitutionally protected privacy. The Missouri courts at all levels ignored the United States Constitution.

## ARGUMENT

**A. The Missouri Court of Appeals, Western District (the "Court of Appeals") has decided important federal questions in ways that conflict with relevant decisions of the United States Supreme Court (the "Supreme Court"), the Florida Supreme Court and the United States Court of Appeals for the Third Circuit (the "Third Circuit") regarding due process, access to the courts, equal protection of the laws, excessive fines and cruel and unusual punishment and the constitutional right of privacy.**

The Court of Appeals by adopting a novel and simplistic concept of judicial immunity and the jurisdiction of courts arrogates to itself the right to abrogate the Statute. The Statute prohibits disclosure of HIV status by "any person" and allows a court order for disclosure only to peace officers, the attorney general or assistant attorneys general acting on behalf of the attorney general, and prosecuting attorneys, and then only in very narrow and tightly controlled circumstances (Appendix A-58). Nobody involved in this case is a peace officer, attorney general, assistant attorney general or prosecuting attorney.

As a practical matter, the Statute removes HIV information from the sphere of civil litigation. This is

reasonable in light of loose talk about the infection. Even a qualified physician might deduce a positive HIV status from a patient's contracting of non-Hodgkin's lymphoma, because it is more common among the HIV-positive than among the population at large (*International Journal of Cancer*, Volume 73, Issue 5 (1997), pages 645-650). But some thirty million people may have been infected by a virus linked to non-Hodgkin's lymphoma in contaminated polio vaccine between 1955 and 1963 (Health Watch, a Public Service of the Office of News and Publications and the Library at the University of Texas Southwestern Medical Center at Dallas, maintained by the Web Services Unit, updated 5 April 2002). Hence diagnosis is problematic, and even incompetent information can be damaging. The Florida Supreme Court in *Rasmussen* at page 537 and footnote 9 noted the public response to AIDS made disclosure a more critical matter, and that the social hostility to AIDS extended to individuals associated with the disease, even though they do not have it.

Hence it is reasonable that the Statute effectively removes the subject of HIV status from civil litigation and allows the courts to order disclosure of confidential HIV related information only to law enforcement authorities on a short leash (Appendix A-58 through A-60). When the Judge issued an order in breach of the Statute by ordering the release of information that could include confidential HIV information, without ordering the redaction of the same, he violated the Statute. A private right of action is provided for violations of the Statute. The private right of action includes injunctive relief (Appendix A-57). The Court of Appeals makes much of the fact that decedent's HIV status was not known. That is not the point. The point is that it should never have become a subject of

inquiry. Even if it were relevant and material, disclosure is unlawful and unconstitutional. If medical records were relevant and material, they could be produced with the unlawful material redacted. But the unlawful information was precisely what Walsh and Funeral Directors sought.

The Court of Appeals purported to cloak the Judge with a judicial immunity radically in excess of common law immunity and the immunity applicable to judges sued for violation of constitutional rights. The Court of Appeals also refused to follow the plain meaning of the Statute as required by law (RSMo § 1.090, Appendix A-50). It has thereby denied the Longs due process by denying them access to the courts to enforce a statutory right of action created by the legislature to sue, among others, the Judge who has violated the Statute. Hence the Court of Appeals has effectively abrogated the Statute on non-constitutional grounds, to the extent it applies to judges.

### 1. The Court of Appeals has decided an important federal question of due process in a way that conflicts with a relevant decision of the Supreme Court.

The courts are subject to constitutional restraints. In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682 (1930) Justice Brandeis said the following on *certiorari* to the Missouri Supreme Court:

> . . . while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State

> has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 475-6.

The Court of Appeals deprived the Longs of all existing remedies for the enforcement of the right of privacy by depriving them of access to the courts under the Statute and the United States Constitution, through the false attribution to the Judge of a judicial immunity that does not exist. The Judge violated the Statute and the Longs' constitutional right of privacy by failing to take into account the constitutional right of privacy and balancing it against discovery rights, and by violating the plain terms of the Statute. The Court of Appeals compounds these wrongs by ignoring the United States Constitution in reliance on a false notion of judicial immunity, and denying all remedies for the enforcement of the right of privacy against a judge performing a judicial function. The opinion of the Court of Appeals conflicts with the foregoing decision of the Supreme Court on the important federal question of due process.

**2. The Court of Appeals has decided an important federal question in a way that conflicts with a relevant decision of the Supreme Court by purporting to find a false edifice of judicial immunity to deny access to the courts for those seeking vindication of their constitutional rights against state judicial actions that violate those rights.**

At common law, judicial immunity is only immunity from liability for damages; a judge remains liable for prospective injunctive relief and legal fees incurred to

obtain the injunctive relief (*Pulliam v. Allen*, 466 U.S. 522 (1984)). Missouri has adopted the common law (*Kilmer v. Mun*, 17 S.W.3d 545 (Mo.*banc* 2000)). In the enforcement of rights under the United States Constitution, the Supreme Court follows the common law (*Pulliam* at pages 536-537, 541-542).

The Court of Appeals, in finding that judicial immunity applies, misrepresents the content of judicial immunity. It treats immunity as if it were immunity from all civil liability whatever; as shown above, judicial immunity is only immunity from damages. The Court of Appeals fails and refuses to follow the Supreme Court with regard to judicial immunity, and denies access to the courts on the false pretext that judicial immunity bars any civil action against a state judge, whether grounded on the United States Constitution, the Statute, or both.

Were *Pulliam* before the Court of Appeals, the defendant judge in that case would not have been enjoined or found liable for the legal fees incurred in obtaining the injunction against her, both of which are allowed by common law judicial immunity. The opinion of the Court of Appeals conflicts with the foregoing decision of the Supreme Court on the important federal question of judicial immunity of state judges from remedies for violating constitutional rights in their judicial capacity.

The Court of Appeals finds the action frivolous solely on the basis of the erroneous premise that common law immunity extend to injunctive relief and the legal fees for obtaining the same. Common law immunity still leaves the Judge liable for prospective injunctive relief and for fees for obtaining the same; hence the action filed by

Moore on behalf of the Longs is not frivolous as it relates to injunctive relief and legal fees.

But the Statute (which also provides for legal fees for the Longs, RSMo §§ 191.656.6(1)(b) and 191.656.6(2)(c)), (Appendix A-56 et seq.) goes further. A statute such as 42 U.S.C. § 1983, which creates no new right of action but merely furnishes a vehicle for enforcing pre-existing rights (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982)) must be read in light of the common law immunity to damages (*Pulliam v. Allen*, 466 U.S. 522 (1984)).

The Statute, on the other hand, creates a new right of action, including injunctive relief and damages, expressly against judges, among others. A judge is a "person" who personifies the court, which the Statute forbids to order the disclosure of confidential HIV information. There is no suggestion in the record that the Statute is unconstitutional or otherwise invalid. There is no suggestion that the legislature can not regulate judicial functions. To the contrary, the Missouri Supreme Court states quite openly that the legislature may reasonably regulate judicial functions, including the quintessential judicial function of statutory interpretation (*Weinstock v. Holden*, 995 S.W.2d 408, 409, 411 (Mo.*banc* 1999)).

There is no suggestion in the record that the legislature lacks the power to change the common law. A statute modifies inconsistent prior law (*Matter of Estate of Thomas*, 743 S.W.2d 74, 77 (Mo.*banc.* 1988). Hence the pre-Statute law was rendered obsolete to the extent that it contradicted the plain words of the Statute. *Pulliam* at pages 541-543 finds that Congress evinced no intent to

modify common-law immunity to eliminate the recovery of legal fees to obtain injunctive relief. *Pulliam* also acknowledged, at page 543, that it was up to Congress to decide whether and to what extent to abrogate common-law immunity. Later, Congress did limit the availability of injunctive relief against judges by adding to 42 U.S.C. § 1983 ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable" (Pub.L. 104-317 (1996); see Appendix A-49). No such language is in the Statute.

Missouri has no formal legislative history, but the plain words of the Statute, which control under RSMo § 1.090 (Appendix A-50) show that the Statute abrogated common law judicial immunity within the scope of the Statute.

There is, therefore, no reason why the Judge should not be liable under the Statute in accordance with its terms. He is a "person" (RSMo § 191.650(10), Appendix A-51). If he violates the Statute, he is liable to any "individual aggrieved by a violation of this section" (RSMo § 191.656.6, Appendix A-56) for damages, injunctive relief and legal fees. Hence the action filed on behalf of the Longs was perfectly justified.

The Missouri courts' dismissal of the Longs' action and the oppressive fine on their counsel, based on a false notion of judicial immunity, denied the Longs access to the courts. If not corrected, it will deny access to the courts for many who can not afford to take the risk of filing a

well-founded legal action against a state judge for violating their constitutional rights.

The Supreme Court holds that people have a first amendment right to access to the courts to vindicate their rights under state and federal law (*In re Primus*, 436 U.S. 412, 423 (1978), *Johnson v. Avery*, 393 U.S. 483, 498 and n. 24 (1968). The Court of Appeals' decision does not follow these opinions when it dismisses the Longs' petition, which is grounded on the Statute and the United States Constitution. The Court of Appeals' decision departs from these cases when it levies an outrageous fine on the Longs' counsel for filing the action, misrepresenting that it is obviously barred by judicial immunity. *Pulliam* shows that it obviously was not barred by judicial immunity.

### 3. The Court of Appeals has decided an important federal question of equal protection of the laws in a way that conflicts with a relevant decision of the Supreme Court by purporting to find judicial immunity of an unprecedented scope.

The basis for the Court of Appeals' denial of access to the Longs to vindicate their constitutional rights and their rights under the Statute, and the brutal punishment of their counsel Moore – part of the denial mechanism – is a fabrication of judicial immunity found in no other authoritative place in American law. A sudden change in the rules to favor a particular person or interest denies equal protection. See *Bush v. Gore*, 531 U.S. 98, 104-105 (2000). The Court of Appeals fails and refuses to follow the Supreme Court in *Bush v. Gore* in respect of the denial of equal protection.

**4. The Court of Appeals has decided an important federal question of excessive fines and cruel and unusual punishment that conflicts with a relevant decision of the Supreme Court by purporting to find judicial immunity of an unprecedented scope.**

The fine imposed on Moore for filing an authorized action violates the Eighth Amendment prohibition against excessive fines and cruel and unusual punishment. The Supreme Court has ruled that punitive damages must bear some reasonable relationship to the offense (*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

But in this case Moore committed no wrong. He repeatedly propounded the obvious to the Missouri courts in the original action for the Longs, because there was no response on the merits. The Missouri courts would not engage the issues. They have still not engaged the issues. That is not Moore's fault.

Finally, in a paroxysm of fatuous retribution, the trial court and Court of Appeals lashed out at Moore with vague but vitriolic invective. The Missouri courts dismissed a meritorious petition on a thoroughly specious ground, and levied a crushing fine on Moore for bringing a perfectly legitimate action pursuant to a valid law. Any fine would be unlawful, for Moore did nothing wrong. The Court of Appeals has not followed the Supreme Court's opinion on the Eighth Amendment in *BMW*, *supra*.

**5. The Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of the Florida Supreme Court and the Third Circuit by disregarding the obligation under the United States Constitution to take into account the constitutional right of privacy when considering pre-trial discovery.**

The Court of Appeals' opinion conflicts with that of the Supreme Court of Florida in *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987). In that opinion, the Florida Supreme Court recognizes its constitutional obligation to balance the constitutional right of privacy against the legitimate requirements of pre-trial discovery and conscientiously performs the required test. The Court of Appeals' opinion does not consider the United States Constitution or the right of privacy. The opinion is in conflict, therefore, with the foregoing opinion of Florida's court of last resort, and a similar opinion by the Third Circuit in *Marcella v. Brandywine Hospital*, 47 F.3d 618 (3rd Cir. 1995).

**B. The Court of Appeals' opinion involves questions of exceptional importance in that the result, if left undisturbed, disturbs the balance and separation of powers as between courts and legislatures and degrades the ability and willingness of lawyers at the bar to initiate actions in support of constitutional rights.**

When the legislature of Missouri denied Missouri's judges access to the courts, judicial review, and even the common law rule of necessity in a matter touching upon the judges' compensation, the Supreme Court of Missouri

found the legislature had gone too far – beyond the normal overlap between government branches – and breached the constitutional separation of powers (*Weinstock v. Holden*, 995 S.W.2d 408 (Mo.*banc* 1999)). In the case at hand, however, the Court of Appeals has invaded the legislature's province by abrogating the Statute without a showing that it is unconstitutional, brutally punishing a lawyer for bringing an action under the Statute passed by the legislature, and ignoring violations of the Statute and the Longs' constitutional right of privacy, when the defendant is a judge. To support its ruthless action, the Court of Appeals claimed to find judicial immunity of an unprecedented scope and to abandon the principle that a statute changes inconsistent prior law.

The Court of Appeals, having based its decision on a misrepresentation of the law of judicial immunity and in disregard of the United States Constitution and the law of Missouri, launches into a splenetic diatribe against counsel for bringing an action authorized by the Statute. The action against Cross and others, according to the Court of Appeals, was "frivolous", "baseless", brought in "bad faith" and "'stealth litigation'", even though, as the record shows, notice was sent to all parties within days of filing. According to the Court of Appeals, " . . . there should have been no doubt after one studies the relevant case law that such a lawsuit had no basis in law." (Appendix A-10). The scope of the learned and erudite Court of Appeals' "relevant case law" seems too limited.

Apparently the "relevant case law" does not include the Supreme Court's exegesis of judicial immunity at common law and in the enforcement of constitutional rights in *Pulliam v. Allen*, 466 U.S. 522 (1984), nor the opinion of the Missouri Supreme Court in *Kilmer v. Mun*,

17 S.W.3d 545 (Mo.*banc* 2000) pointing out that Missouri has adopted the common law, nor the opinion of the Supreme Court of Florida in *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987) and the Third Circuit in *Marcella v. Brandywine Hospital*, 47 F.3d 618 (3rd Cir. 1995) recognizing that the constitutional right of privacy and the provisions of statutes regulating judicial disclosure of sensitive information must be taken into account in pre-trial discovery.

Apparently the "relevant case law" does not include the Supreme Court's opinion, on *certiorari* to the Supreme Court of Missouri, that state courts are subject to constitutional restraints (*Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930)) and must afford due process and access to the courts.

Apparently the "relevant case law" does not include the Court of Appeals' own opinion that the Statute's meaning is plain and that it is binding on the courts (*State ex rel. Callahan v. Kinder*, 879 S.W.2d 677 (Mo.App.W.D. 1994)).

Apparently the "relevant case law" does not include the Missouri Supreme Court's opinion in *Weinstock v. Holden*, 995 S.W.2d 408 (Mo.*banc* 1999) that Missouri judges are bound by RSMo § 1.090, which reads as follows:

> Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

*Pulliam*, *supra*, shows that the courts below were obviously wrong to dismiss the action against the Judge and obviously wrong to fine counsel for bringing it. Their

notion of judicial immunity is false. Their notion that they are authorized to disregard the plain meaning of the Statute is false. The judges involved in this travesty should be sent to their respective chambers, there to lapse into penitence and review their fundamental attitudes toward the laws and constitutions they have sworn to protect, particularly with regard to the rights of the people to go to the courts to vindicate their legal and constitutional rights against unlawful and unconstitutional conduct by judges. For the accusers are the ones who are creating the disruption they so vociferously deplore, by disregarding fundamental legal and constitutional rules and fabricating new ones to suit their own purposes.

Failing the Supreme Court's review by *certiorari*, other state courts preoccupied with their parochial concerns will follow in the footsteps of the Court of Appeals, and the skein of constitutional protection against the breach of constitutional rights by state employees acting in a judicial capacity will be rent asunder.

In the growth of the common law and the ebb and flow of great social, political and legal currents of thought and action, litigating lawyers have often gone against the tide until they turned the tide. Racial desegregation is but one example.

How many reforms, and reforms of reforms, would have gone by the board, and how many issues would have been left unreviewed, if advocates had to contend with crushing penalties by imperial courts for bringing actions authorized by statute, which the judges deemed offensive, unwise, annoying, burdensome, disruptive, or otherwise undesirable?

If authorized actions may be punished by Draconian fines, what will be done with those litigants and lawyers whose actions are at least arguably innovative or in the final analysis unsuccessful? All the more reason, in such an event, to do as the English do, require the losing side to pay the expenses of the prevailing side. Then, as with the English, the impecunious may fear to sue the wealthy, even on a meritorious claim, for fear the wealthy may retain expensive counsel to run up costs to the point where the poor may be forced to surrender or risk total ruin in the event of a loss at trial.

A crushing fine against counsel, for bringing an action authorized by the Statute and the United States Constitution, is one means of denying access to the courts. Given the result in this case, how can any counsel be confident that the filing of an authorized action, to vindicate constitutional rights violated in the course of a judicial function, will not be dismissed on a frivolous ground and a devastating fine imposed?

A number of other states regulate their courts' conduct in dealing with HIV related information (Colorado, Delaware, Georgia, Iowa, New Jersey and the Commonwealth of Pennsylvania, for example). The public perception of an HIV-positive condition, the risk of people jumping to conclusions with regard to its existence, the large number of people who might be afflicted, the inability of some counsel to resist the temptation to drag the information into a case where it does not belong, out of malice and a desire to divert the cause into a miasma of meretricious disputes, the failure of weak and ineffectual judges to prevent such tactics, and the effect of disclosure of sensitive information on the constitutional right of privacy, all of these considerations suggest that the issues posed by

this case are likely to recur in many future cases. The Supreme Court's consideration of this case will provide guidance to facilitate the resolution of many future cases, and nip in the bud the nefarious and noisome tendencies exemplified by the "'contentious litigation'" (Appendix A-4 fn. 2) and court decisions leading to this petition.

## CONCLUSION

Review of the Court of Appeals' decision through a writ of *certiorari* will yield a result for the Longs and Moore and, significantly, for others, which will conform to the teachings of the Supreme Court, restore harmony in the application of constitutional safeguards, and help to preserve fundamental concepts of ordered government.

Respectfully submitted,

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August 2003

# APPENDIX

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# APPENDIX

103 S.W.3d 249

**Elgie L. LONG, Sr., et al., Appellants,**
**v.**
**CROSS REPORTING SERVICE, INC., et al., Defendants,**

**Funeral Directors Service, Inc.; Carol [sic] Franke Walsh; and William Stephen Nixon, Respondents.**

**No. WD 61272**

Missouri Court of Appeals,
Western District.

Feb. 25, 2003.
Motion for Rehearing and/or Transfer to Supreme Court Denied April 1, 2003.

Application for Transfer Denied May 27, 2003.

Dennis J. Campbell Owens, Albert W. L. Moore, Jr., Kansas City, MO, for Appellants.

Kendall Paul Day, Kansas City, MO, for William Stephen Nixon.

Carol [sic] F. Walsh, Kansas City, MO, for Carol [sic] Walsh and Funeral Directors Service.

Before: THOMAS H. NEWTON, P.J., ROBERT G. ULRICH and EDWIN H. SMITH, JJ.

THOMAS H. NEWTON, Presiding Judge.

The Long Family ("appellants") seeks a review of the trial court's judgment, which dismissed their petition and awarded sanctions against their attorney.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying Petition, upon which the instant matter is based, is a suit initiated by appellants in 1997 seeking damages for the loss of a watch owned by Garold Long, deceased. That Petition alleged that Funeral Directors Service, Inc., Kansas City Funeral Directors, Inc., and Thaddeus Lee Rogers ("Respondents") were liable for the loss of this watch because it was lost while respondents had the care of Garold Long's body preparing for his funeral. This lawsuit was brought on behalf of appellants by two attorneys ("lead counsel" and "secondary counsel") who practice in the Kansas City area.

The merits of this case were never heard, however, because the trial court dismissed the Petition with prejudice. That dismissal was appealed before this Court, and we affirmed the trial court's dismissal of the Petition. *See Long v. Funeral Dirs. Serv., Inc.*, 96 S.W.3d 885 (Mo.App.W.D.2002).

During the pre-trial stages of that lawsuit, a discovery dispute arose that led to the new petition. This dispute involved the medical history of the deceased and was related to the deceased's HIV status (which still remains an unresolved question to this day). The Honorable W. Stephen Nixon ruled against appellants on that issue. In this Petition, it was alleged that the Jackson County Circuit Court (Division 5), the Honorable W. Stephen Nixon presiding, "failed and refused to enforce §§ 191.656[1] and 196.657 of the Revised Statutes of Missouri [that

[1] Unless otherwise indicated, all statutory citations are to RSMo 2000.

pertain to the disclosure of medical records regarding an individual's HIV status], the Missouri discovery rules and the Constitutions of Missouri and the United States of America." Accordingly, this suit sought an injunction and damages against Judge Nixon. This suit also named a host of other parties including the following: Cross Reporting Service, Inc.; William V. Denton; Poe & Company Electronic Reporting; Funeral Directors Service, Inc.; Thaddeus Lee Rogers; Kansas City Funeral Directors, Inc.; Carol [sic] Frankie [sic] Walsh, Esq.; Sue Langston-Ames; Rhonda S. Loepke, Esq.; and Ivra Cross.

Respondents filed individual motions to dismiss the Petition. The trial court dismissed appellants' Petition against Judge Nixon in a written order on November 21, 2001, and found that Judge Nixon was shielded by judicial immunity. Following this ruling, appellants filed a Motion for Dismissal Without Prejudice as to the remaining defendants on January 23, 2002, which was subsequently granted by the trial court.

During this litigation on the pleadings, the respondents filed separate motions for sanctions against appellants' attorneys as listed on the Petition. On December 28, 2001, the trial court issued a written order granting the motion, as it pertained to Carol [sic] Franke Walsh and Funeral Directors Service, Inc., for sanctions against the attorneys as listed on the instant Petition. On January 23, 2002, the trial court held an evidentiary hearing on Judge Nixon's motion for sanctions, and, on January 25, 2002, the trial court issued a written order granting this motion for sanctions in favor of Judge Nixon.

On the issue of damages in regard to the sanctions, the trial court set a separate hearing to resolve that

dispute. On February 26, 2002, the trial court issued a written judgment awarding sanctions against appellants' lead counsel, in the sum of $14,264.80 to Carol [sic] Walsh and Funeral Directors Services, Inc., and $7,188.01 to Judge Nixon. Furthermore, on the basis of the evidence at the hearing, the trial court amended its December 28, 2001, order of sanctions against appellants' secondary counsel. During that evidentiary hearing, it was not disputed that the secondary counsel did not authorize his name on the pleadings. Moreover, lead counsel admitted that he did so without secondary counsel's authorization. Accordingly, the award of sanctions issued by the trial court was amended to reflect liability for attorney's fees against lead counsel only.

This appeal followed.[2]

Appellants bring two points on appeal. In Point I, it is asserted that the trial court erred "in dismissing the claims against the respondents because the appellants stated a valid cause of action in the plain language of the law [that] supports the appellants' claims against respondents." In Point II, it is further argued that the trial court erred "in awarding sanctions against [appellants' attorney], in favor of Judge Nixon, Attorney Walsh, and Funeral Directors Service, Inc., because [the attorney] did

[2] It should be noted that this background section is only a brief synopsis of the procedural background necessary to decide the current dispute on appeal. Indeed, this represents only a snapshot of what has become, to quote the trial court's February 26, 2002, judgment, "contentious litigation between the parties and their lawyers, involving four divisions of this Court as well as a detour to the federal court, not to mention at least two trips to the Missouri Court of Appeals and one to the Missouri Supreme Court."

not violate Rule 55.03,[3] in that the plain language of existing law warrants the claims raised by [attorney's] petition, and the appellants' claim for injunctive relief had a cognizable legal basis under § 191.656."

## II. LEGAL ANALYSIS

In Point One, appellants argue that the trial court erred in dismissing the Petition. In reviewing the trial court's grant of a motion to dismiss "we engage in an essentially de novo review of an issue of law." *In re Swearingen,* 42 S.W.3d 741, 745 (Mo.App. W.D.2001). We assume all facts alleged are true and construe the allegations favorably to the plaintiff. *Id.* Ultimately, "we review the petition to determine whether it invokes principles of substantive law and whether the facts alleged, if proven, would entitle the plaintiff to relief." *Id.* at 746.

In actuality, Point I raises the limited question of whether the trial court erred in dismissing the Petition as it relates to Judge Nixon. As previously mentioned, after the trial court ruled that appellants did not bring a viable suit against Judge Nixon, appellants filed a motion voluntarily dismissing the suit as it pertained to the remaining defendants.[4] The trial court dismissed, in its November 21,

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[3] All rule references are to Missouri Rules of Civil Procedure (2002) unless otherwise indicated.

[4] Accordingly, we must agree with respondents' (Carol [sic] Walsh and Funeral Directors Service, Inc.) contention in Point II of their brief before this Court: "This Court does not have jurisdiction over the Trial Court's Order dismissing the claims against [them] because Appellants filed a Dismissal Without Prejudice as to all remaining defendants in the case, including Carol [sic] Frankie [sic] Walsh and Funeral

(Continued on following page)

2001, order, appellants' petition against Judge Nixon on the basis that "judges acting within their official capacity are immune from civil liability." (citing *Nelson v. McDaniel,* 865 S.W.2d 747, 748 (Mo.App. W.D.1993)). It is true that "[a] judge with subject matter jurisdiction has judicial immunity from all actions taken, even when acting in excess of his jurisdiction." *State ex rel. Raack v. Kohn,* 720 S.W.2d 941, 944 (Mo. banc 1986). "Judicial immunity exists not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, in whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* (citations and quotations omitted).

The basis of appellants' suit against Judge Nixon was that he violated the provisions of §§ 191.656 and 191.657 because he "was unauthorized to order disclosure of this

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Directors Services, Inc., which is not a final judgment and so [is] not appealable." It is fundamental that, unless extraordinary circumstances are alleged, a trial court dismissal without prejudice is not a final judgment and, therefore, is not appealable. *See Osuji v. Mo. Dep't. of Soc. Servs.,* 34 S.W.3d 251, 253 (Mo.App. E.D.2000); *see also Doe v. Visionaire Corp.,* 13 S.W.3d 674, 676 (Mo.App. E.D.2000) ("[D]ismissals without prejudice have been held appealable in such cases where the dismissal was based on statutes of limitations, theories of estoppel, a plaintiff's lack of standing, failure of the petition to state a claim where the plaintiff chose not to plead further, failure of a plaintiff in a medical malpractice action to file the health care provider affidavit and the plaintiff's claims not being covered by the statute upon which the petition was based."). Therefore, because appellants allege no extraordinary circumstances as to why this voluntary dismissal at their request should be an appealable order, respondents are correct that we do not have jurisdiction to entertain the question of whether the trial court improperly dismissed the Petition as it pertains to them, and, therefore, we will analyze this issue only as it pertains to the suit against Judge Nixon.

HIV related information," and, therefore, Judge Nixon's judicial immunity had been abrogated by his conduct as a judge. What this "HIV related information," as the appellants call it, consists of is still a mystery to this date. As the trial court states in its judgment, at no time have the appellants alleged that the deceased, Garold Long, was in fact HIV positive. Instead, in their brief before this Court, appellants argue that "[i]n using the phrase 'an individual's HIV infection status,' the Missouri General Assembly's plain language indicates that an individual is protected from disclosure of the fact he or she is positive *or negative.*" (emphasis added). Although we hold reservations as to whether this broad interpretation of the statute is accurate (that those not infected with HIV somehow have a protectable right under the relevant statute), we need not address that issue. Under our standard of review, the sole question presented for review is whether, assuming *arguendo* Judge Nixon somehow misapplied the statute in the pre-trial stages of appellants' suit against the funeral home, that error by Judge Nixon would justify legal action notwithstanding the well developed doctrine of judicial immunity? After reviewing the well-established case law on this issue, we must answer that question in the negative.

The United States Supreme Court, in *Pierson v. Ray,* discussed the doctrine of judicial immunity in the following passage:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for acts committed within their judicial jurisdiction. . . . This immunity applies even when the judge is accused of acting maliciously and corruptly. . . . It is a judge's duty to decide all

> cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principles and fearless decision-making, but to intimidation.

386 U.S. 547, 553-554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (citations and quotations omitted). It cannot be questioned that Missouri courts have embraced these propositions of law wholeheartedly. "So long as a judge does not act wholly without jurisdiction, judicial immunity protects him or her from liability." *Nelson,* 865 S.W.2d at 748 (citing *Raack,* 720 S.W.2d at 941). "When judicial immunity is at issue, jurisdiction is to be construed broadly." *Id.* (citing *Stump v. Sparkman,* 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978)).

At no point in this litigation have the appellants charged that Judge Nixon acted without the force of his jurisdictional power. Quite to the contrary, as the trial court found in its November 21, 2001, order, appellants conceded that any action taken by Judge Nixon was pursuant to his judicial authority. This passage of the trial court's order is as follows:

> [T]he Petition reads that in the above-mentioned suit Judge Nixon 'failed and refused to enforce' various discovery provisions of the Revised Missouri Statutes. That he failed and refused to enforce those rules necessarily assumes that Judge Nixon had the power to do so. It follows [ ] then that Judge Nixon had jurisdiction over [the suit]. According to *Raack,* he, therefore, cannot be held

> liable for his decisions in that case, regardless of whether or not they were correct.

We concur with this analysis and are perplexed as to how this immunity could have plausibly been abrogated. Appellants spend much time and effort attempting to explain how the discovery statute that they complain of somehow gives them a legal right to sue a judge acting in his official capacity; however, they cite no authority for the proposition that the statute in question (or any statute for that matter) gives an individual such a right. Therefore, Point I is denied because appellants' Petition, taken on its face, failed to allege a viable cause of action, and, therefore, the trial court did not err in dismissing the Petition as it related to Judge Nixon.

In Point II, appellants argue that the trial court erred in "awarding sanctions against [appellant's attorney], in favor of Judge Nixon, Attorney Walsh, and Funeral Directors Service, Inc., because [attorney] did not violate Rule 55.03, in that the plain language of existing law warrants the claims raised by [attorney's] petition, and further, the appellants' claim for injunctive relief had a cognizable legal basis under § 191.656. R.S.Mo." The award totaled $14,264.80 for Ms. Walsh and Funeral Directors Service, Inc., and $7,188.01 to Judge Nixon. The standard of review for an award of sanctions is abuse of discretion. *Brown v. Kirkham,* 23 S.W.3d 880, 882 (Mo.App. W.D.2000). "An abuse of discretion occurs when the court's order is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* at 882-83.

Rule 55.03(c) permits the trial court to award sanctions against an attorney who files a frivolous action. *See Robin Farms, Inc. v. Beeler,* 991 S.W.2d 182, 186 (Mo.App. W.D.1999) ("We agree that if a party's claims are initiated frivolously or brought in bad faith, the trial court has the discretion to impose sanctions as a deterrent to similar conduct in the future and to recompense the other party."); *see also Noland v. State Farm Mut. Auto. Ins. Co.,* 853 S.W.2d 327, 330 (Mo.App. W.D.1993) ("The sanction of attorney's fees and costs are to compensate the opposing party the cost of defending against the baseless motion or pleading.").

After reviewing the briefs of the parties on appeal and the relevant case law, we cannot say that the trial court abused its discretion in sanctioning appellants' attorney. On appeal, appellants contend that the trial court abused its discretion in awarding attorneys fees solely on the basis that the Petition had merit. However, as explained in Point I, there should have been no doubt after one studies the relevant case law that such a lawsuit had no basis in law. Appellants' brief states that:

> By imposing sanctions on [appellants' attorney], the court has chilled the appellants' right to enter a court and have their case heard on its merits, as is guaranteed under the Missouri Constitution. This ruling will deter other lawyers from pursuing claims explicitly provided by statutes. This ruling denies the appellants their right to due process of law as provided for in the Fourteenth Amendment to the Constitution of the United States.

We must disagree. In the past several years, this attorney has engaged in what has been referred to as

"stealth litigation" for his clients, the Longs. As the trial court found in its judgment, "[attorney's] machinations belie any claim of good faith or mere zealous advocacy. They evidence an attitude of indifference to the orderly process of the Courts of this state." To cite only some of the more egregious examples of this conduct, appellants' attorney placed the name of an attorney on the pleadings of the instant lawsuit willfully and wantonly without that attorney's permission. Moreover, the trial court found that appellants' attorney "withheld service of process by concealing the existence of this lawsuit. His conduct in the federal case was similar; to this date he *still* has not attempted service in that case." On appeal, appellants' attorney does not deny any of the allegations or even attempt to explain why this morass of motions, lawsuits, and writs before various courts in the Kansas City area was necessary to advocate for his clients. Therefore, we find that the trial court did not abuse its discretion in granting the motions for sanctions and for awarding attorney's fees. Point denied.

## III. Conclusion

Based on the foregoing, and after a thorough review of the record on appeal, we affirm the trial court's ruling.

ROBERT G. ULRICH and EDWIN H. SMITH, JJ. concur.

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT INDEPENDENCE

ELGIE L. LONG, SR, et al,

PLAINTIFFS,

V.

CROSS REPORTING SERVICE, INC., et al.,

DEFENDANTS.

CASE NO. 01CV205624

DIVISION 2

ORDER AND JUDGMENT

This cause represents one phase of contentious litigation between the parties and their lawyers, involving four divisions of this Court as well as a detour to the federal court, not to mention at least two trips to the Missouri Court of Appeals and one to the Missouri Supreme Court.

The case at bar amounts to an attempt by Plaintiffs to appeal to this Court a discovery order by Defendant, Nixon, a Circuit Court Judge of this Court. Of course, plaintiffs do not denominate their action as one for appeal, but by any rational reading of Plaintiffs' pleadings, the only conclusion to be drawn is that they seek to have this Court exercise appellate jurisdiction or superintending control over another Court of concurrent jurisdiction. By glib and superficial analysis, Plaintiffs argue that the Missouri General Assembly has invested this Court with a species of jurisdiction reserved to appellate courts and that the legislature has casually abrogated the ancient doctrine of judicial immunity and, along the way, the concept of judicial independence. The authority cited for these broad propositions is breathtaking in its paucity.

Upon application by two Defendants, on December 28, 2001, this Court granted sanctions as to Plaintiffs' counsel, Albert W.L. Moore, Jr. and Jack Terry. At a hearing before this Court on February 11, 2002, Mr. Terry testified that he was shocked to learn that Moore had affixed his name to the pleadings in this cause. He further testified that he did not give his permission to Moore to use his name at bar. Moore *admitted* that he embarked on the present course without seeking Terry's consent before suing numerous lawyers, state officials, court reporters, and a judge. Indeed, Mr. Terry testified that the first time he learned he was co-counsel in a suit against those Defendants was at the initial hearing on sanctions held before this Court on January 30, 2002.[1] Since Mr. Terry was an unknowing, unwitting, and unwilling accomplice to the instant cause, the Court indicated at the February 11 hearing its intention to vacate the sanctions Order as to him. Mr. Terry should not be penalized for Moore's unauthorized appropriation of his name.

Plaintiffs have filed various motions including a Motion to Reconsider Order of Dismissal as to Defendant, Nixon, and a Motion to Reconsider Sanctions. Those Motions will be addressed below.

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[1] The purpose of that hearing was to determine the amount of the sanctions awarded pursuant to the Court's Order of December 28, 2001. That hearing was continued at Moore's request to allow his lawyer time to review the amount of attorney fees incurred by counsel for two of the Defendants.

**Dismissal as to Judge Nixon**

Defendants, Walsh and Funeral Directors Service, Inc., have filed certified copies of various pleadings from cases other than the one *sub judice*, but which shed light on the context of the instant cause. From those pleadings it appears that Plaintiffs sued Funeral Directors Service, Inc. and various other defendants, including the ubiquitous John Doe, in 1997. That case was given case number CV97-26985 and was eventually assigned to Judge Nixon of Divison [sic] 5 of this Court. Later, Plaintiffs filed their Third Amended Petition, a prolix and rambling document that alleges that Plaintiffs are the parents and brother of Garold Long. Mr. Long died on May 3, 1993, and Plaintiffs accuse defendants of desecrating Mr. Long's body by an undisclosed "ghoulish act inflicted on the mortal remains" of Mr. Long (Third Amended Petition, ¶ 12). They also accuse Defendants of stealing a Rolex watch from Mr. Long's body worth "Twelve Thousand Dollars ($12,000.00) plus tax." (Third Amended Petition ¶ 4.) Apparently, some three years after suit was filed, a discovery dispute arose, and Plaintiffs filed a Motion for Protective Order on September 8, 2000. In the overheated rhetoric that appears to be the norm for Plaintiffs' counsel, he accuses Defendants and their counsel of seeking confidential medical records pertaining to Mr. Long. Neither in their Motion, nor in the supporting Suggestions they filed, did Plaintiffs make any claim that Mr. Long suffered from HIV or AIDS, nor did they cite R.S.Mo. §§ 191.656 or 191.657 (2000), statutes that make medical records pertaining to HIV or AIDS confidential. On February 7, 2001, Judge Nixon sustained most of the Plaintiffs' Motion, but he did permit the identification of hospice representatives

who cared for Mr. Long and hospice records for the last three months of his life.

This prompted a Motion to Enjoin Prohibited Disclosure on February 27, 2001. For the first time Plaintiffs asserted that the discovery would violate §§ 191.656 and 191.657. Interestingly, Plaintiffs did not allege that Mr. Long had AIDS, nor did they claim he was HIV positive. Judge Nixon denied the Motion to Enjoin on March 9, 2001.

Thereafter, plaintiffs made their first trip to the Missouri Court of Appeals, filing a Petition for Writ of Mandamus and Writ of Prohibition on March 12, 2001. In Paragraph 5 of that Petition it appears that *Plaintiffs affirmatively assert that Mr. Long was not HIV Positive.* According to evidence elicited at a hearing before this Court on February 11, 2002, Plaintiffs' counsel, Mr. Moore, informed the members of the Court of Appeals that they were either illiterate (according to Defendants' counsel) or incapable of comprehending what they read (according to Mr. Moore). Plaintiffs' Petition for Writ of Mandamus was denied the same day it was filed.

A week later Plaintiffs were off to Jefferson City where they filed another Petition for Writ of Mandamus and/or Prohibition. Suggestions in Opposition to that Petition were filed with the Supreme Court on March 30, 2001. In those Suggestions Defendants asserted that one of the Plaintiffs testified in his deposition that the hospice nurse who cared for Mr. Long was present at the time Plaintiffs claimed Defendants were committing ghoulish acts on the remains of Mr. Long. If the hospice nurse was a witness to the alleged ghoulish acts, it is understandable that Judge Nixon would deny Plaintiffs' attempt to conceal

his or her identity. Defendants also sought hospice records in order to identify hospice nurses who may have seen the ghoulish acts or theft of the $12,000 watch, and Judge Nixon's Order to produce hospice records is similarly understandable. It is hard to see how Judge Nixon's Order of February 7, 2001, thereby violated §§ 191.656 or 191.657. Defendants went on to state that they had not "sought 'records concerning an individual's HIV infection status' or 'the results of any individual's HIV testing.'" (Defendant's Suggestions filed with the Supreme Court on March 30, 2001 at 6.) Defendants also noted that § 191.656 could not apply since Plaintiffs "have repeatedly denied that the decedent had AIDS or HIV." (*Ibid.*) Reduced to its essence Plaintiffs argued that they should be protected from the disclosure of records by a statute which, by their affirmative representations, did not apply to them. It is hardly surprising, then, that on April 24, 2001, the Supreme Court denied Plaintiffs' Petition.

The CV97-26985 case was apparently set for trial in October of 2001, because Plaintiffs went back to the Court of Appeals *again,* filing *another* Petition for Writ of Mandamus and Prohibition on October 12, 2001. On October 15, 2001, that Court denied Plaintiffs' Petition. Trial was scheduled to commence that day in Case No. CV97-26985, but when the case was called, Plaintiffs failed to appear, and the case was dismissed for want of prosecution. Plaintiffs have represented that they appealed that dismissal.

Meanwhile, on March 14, 2001, Plaintiffs filed the instant cause, originally only as to Cross Reporting, seeking to enjoin the transcription of a deposition. The original Petition cited § 191.656 but again failed to allege that Mr. Long's HIV status was included in the subject

discovery. The case was originally assigned to Judge Daugherty who entered *an ex parte* Temporary Restraining Order on the same day Plaintiffs' Petition was filed.

On March 16, 2001, Plaintiffs filed their First Amended Petition for Injunction and Damages in the case *sub judice.* In Plaintiffs' First Amended Petition, they joined many, many court reporters, the lawyers for Defendants in CV 97-26985, state officials, and Judge Nixon. On the same day a Motion for Approval and Appointment of Private Process Server was filed. It does not appear from the file that Plaintiffs took any steps to obtain an Order on that Motion – the usual practice in this Circuit. Instead, they waited for the Court Administrator to enter an Order, which occurred on June 26, 2001. Thereafter, the matter languished, and it is apparent from the file that Plaintiffs' counsel was content to hold this case as his "card in the hole," notifying none of the Defendants of the pendency of this case. (At the hearing before this Court on February 11, 2002, Mr. Moore testified to various reasons why he delayed effecting service in the instant cause. Having viewed the demeanor of the witness, the Court finds that testimony to be not credible.) Thus, it is apparent that Moore continued to deal with counsel and the trial judge assigned to hear CV97-26985, but failed to inform them that he was suing them. Moore has not explained whether this failure was the product of a faulty memory or baser motives.

On October 4, 2001, shortly before Case No. CV97-26985 was to go to trial, Plaintiffs filed *another* Motion for Temporary Restraining Order in the instant cause. It appears from the file that Plaintiffs purposely withheld sending a copy of the March 14 TRO to the parties, conduct which is presumptively sanctionable under Rule

92.02(b)(6). From the court file it appears the October 4 Motion was filed *less than one week* after the first Defendant in the instant cause was served, *nearly seven months after suit was filed.*

One other suit was apparently going on at the same time. On October 15, 2001, *yet another* suit was filed in federal court. This time Plaintiffs sued defense counsel in CV97-26985, court reporters, and Judge Daugherty (who, by this time, had inherited Case No. CV97-26985). Once again Plaintiffs filed an "Application *[sic]* for Temporary Restraining Order." AT the February 11, 2002 hearing the parties stipulated that "Application" was denied by the federal court. Interestingly, Mr. Moore testified at the hearing that, as was true in the case at bar for several months, he has not yet taken steps to serve any of the Defendants in the federal court action; rather, he is waiting, biding his time.

In any event, in the case at bar Plaintiffs argue that the enactment of a statute creating a private cause of action for releasing information concerning AIDS thereby abolished judicial immunity. They cite no authority for that proposition, nor did they cite such authority at the hearing on February 11. Indeed, they admitted that no reported Missouri cause has *ever* held that enactment of a statute has abolished or can abolish judicial immunity. Plaintiffs' inability to cite such authority is the result of the simple fact that it does not exist. There are good reasons for that absence.

**Judicial Immunity**

The classic exposition of the rule of judicial immunity appears in *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967):

> Few doctrines were more solidly established at common law than the immunity of judges from liability for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." [Citation omitted.] It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arose the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have the fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation.

In *State ex rel. Raack v. Kohn*, 720 S.W. 2d 941, 944 (Mo. *en banc*. 1986), the Missouri Supreme Court embraced this language, expressly citing *Pierson, supra*. *Accord: Howe v. Brouse*, 427 S.W. 2d 467 (Mo. 1968). However, Missouri first recognized the doctrine in *Stone v. Graves,* 8 Mo. 148 (1843). In that case the plaintiffs brought an action against a justice of the peace for misconduct in office. The Court cited the English case of *Lansing v. Yates,* 5 Johns. 291, in which Justice Kent noted the "doctrine which holds a judge exempt from a civil suit for any act done or omitted by him sitting as a judge. . . ." 8 Mo. at 150.

Judicial immunity is only overcome in two instances: (1) in actions not taken in the judge's judicial capacity; and (2) Actions taken in the complete absence of *all* jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). In regard to the second instance, a judge will not be deprived of immunity because the action he took was in error or was in excess of his authority, *Ibid.* at 13. It follows from this that, "A judge is *absolutely immune* from liability from his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (emphasis added).

At least two policies would appear to underlie judicial immunity. First, it is fundamental to the existence of judicial independence, a critical underpinning of ordered liberty. As Justice Field noted in *Bradley, supra,* if losing litigants could sue judges for decisions with which they disagreed, "the protection essential to judicial independence would be entirely swept away." 20 L. Ed. at 650. At another point the Court said:

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

*Ibid.* at 649. Hence, the principle "obtains in all countries where there is any well ordered system of jurisprudence." *Ibid.*

Aside from the need to preclude the erosion of judicial independence, a second, more fundamental basis exists for the doctrine in Missouri. Judicial immunity "originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Forrest v. White,* 484 U.S. 219, 225 (1988). Before the doctrine was recognized in English jurisprudence during the 14th Century reign of Edward III, there were no appellate courts, and judges could be sued for judicial acts by the filing of complaint of "false judgment," 1W. Holdsworth, *A History of English Law* 213-214 (7th ed. 1956). While the King's Bench was the central common law court, its jurisdiction was sometimes collaterally attacked by ecclesiastical courts and local feudal courts. In order to prevent such attacks, appellate and extraordinary writ procedures were instituted by the King's bench, R. Pound, *Appellate Procedure in Civil Cases* 25-26 (1941). As Justice Powell noted: "To ensure this procedure, it was necessary to immunize the judicial acts of common-law judges from collateral attack – hence the doctrine of judicial immunity." *Pulliam v. Allen*, 466 U.S. 522, 546 n. 5 (1984) (Powell, J. Dissenting Opinion).[2] Thus viewed, it can be

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[2] *Pulliam* was [sic] 5-4 decision in which the Supreme Court allowed a limited exception to judicial immunity in cases where federal judges enjoined unconstitutional acts by state judges. The Court was careful to continue to observe the immunity of state judges from liability for damages, 466 U.S. at 532. The grant of equitable relief was consistent with the supervisory review federal courts frequently exercise over state courts. *Stephens v. Herring*, 827 F. Supp. 359, 364 (E.D. Va. 1993). In contrast, federal courts have generally held that they have no authority to issue injunctions or extraordinary writs against courts of equal authority, described (correctly) as "horizontal appeals." *Ibid.* at 365. Similarly, state courts have held that *Pulliam*

(Continued on following page)

seen that judicial immunity was a necessary prerequisite to the implementation of the exercise of appellate jurisdiction and superintending control by appellate courts, since actions against judges would, at best, duplicate the remedies available in appellate courts, and, at worst, run the risk of inconsistent results.[3]

Permitting one circuit court to review another circuit court's actions would amount to a "horizontal appeal," *Mullis v. United States Bankruptcy Court for the District of Nevada,* 828 F. 2d 1385, 1392 (9th Cir. 1987), whereby this Court could circumvent the appellate procedure established by the Constitution of Missouri. Indeed, if Plaintiffs at bar were correct, they could even ask this Court to assess damages against the members of the Court of Appeals and the Supreme Court for not prohibiting Judge Nixon's discovery orders. That would amount to a "reverse review" of rulings of appellate courts by this Court, *Mullis, supra*, 828 F. 2d at 1393. Since appellate jurisdiction is established by the Constitution of Missouri, and since Plaintiffs' theory would circumvent the bounds of that jurisdiction, it follows that in Missouri judicial immunity enjoys a Constitutional, as well as common law, basis.

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grants no authority to state courts to sit in judgment of a coequal state court, *Smith v. State,* 264 Kan. 348, 955 P. 2d 1293, 1298 (1998).

[3] Consider the instant cause. Plaintiffs claim they have appealed the dismissal of their original claim. Assume they raise the propriety of Judge Nixon's discovery order on appeal. If this Court proceeded to try the instant cause and ruled against Judge Nixon, what would happen on appeal? If the appellate court ruled against Plaintiffs, could they then sue the appellate judges?

In that connection, Article V, §3 of the Missouri Constitution vests the general appellate jurisdiction in this state with the Court of Appeals, *Lambing v. Southland Corporation,* 739 S.W. 2d 717, 718 (Mo. *en banc.* 1987), with additional, limited appellate jurisdiction possessed by the Supreme Court, *Fisher v. Lavelock*, 282 S.W. 2d 557, 560 (Mo. 1955). Additionally, Article V, §4 grants the Supreme Court and the Court of Appeals "general superintending control" over inferior courts.

Neither of the foregoing sections gives this Court the authority to control the actions of another division of this Court. Neither section grants this Court the power "to review and revise the judicial action" of another circuit court, the gravamen of "appellate jurisdiction," *State ex rel. Williams v. Anthony,* 65 Mo. App. 543, 552 (1896). Nor do they afford this Court the power of superintending control over other circuit courts since "superintending control is the power to control the course of ordinary litigation in inferior courts," *State v. Roy*, 40 N.M. 397, 60 P. 2d 646, 661, 110 A.L.R. 1 (1936), and another division of this Court is not an "inferior court."

If this Court were permitted to second-guess the orders of other Circuit Court Judges for their judicial acts – something that would be indispensable to the maintenance of an action against such judges – it would necessarily involve this Court in either reviewing and revising the judicial action of another court – i.e., exercising appellate jurisdiction – or in control of the course of ordinary litigation of another circuit court – i.e., superintending control. As has been seen, the Constitution vests that kind of jurisdiction exclusively in the Court of Appeals and the Supreme Court. Judicial immunity is essential to prevent interference with the exercise of that jurisdiction.

Missouri law is replete with cases that tacitly recognize these principles. In *Comfort v. Higgins*, 576 S.W. 2d 331, 340 (Mo. *en banc.* 1978), the Supreme Court held that, "Once a division of the [circuit] court acquires jurisdiction of the subject matter of a suit, it holds it to the exclusion of all other courts of concurrent jurisdiction." Similarly, in *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 107 S.W. 487 (*en banc.* 1907), the Court said that it was:

> . . . beyond question that courts of co-ordinate authority have no power or jurisdiction to encroach upon or intermeddle with the power and authority of each other after one has taken jurisdiction of a case. Whenever a court of competent authority takes jurisdiction of a case, that fact must of necessity, and in the very nature of things, exclude the jurisdiction of all other courts over the same case, as well as the incidents thereto, excepting only such courts as are given appellate and supervising control over them.

Consistent with this principle, Missouri Courts have held that circuit courts may not issue writs of mandamus against other circuit courts, *State ex rel. Melahn v. Romines,* 815 S.W. 2d 92, 94 (Mo. App. 1991). Nor may they enjoin proceedings in other circuit courts, *State ex rel. Rimco v. Dowd,* 858 S.W. 2d 307, 309 (Mo. App. 1993).

**Statutory "Repeal" of Judicial Immunity**

Plaintiffs argue that by creating a private cause of action for disclosing HIV or AIDS information, the legislature intended to abolish the seven centuries of Anglo-American jurisprudence that underlies the doctrine of judicial immunity. They claim this is so because the

statute does not exempt judges, whether circuit or appellate, from its reach.

Plaintiffs are correct about one thing: The statute is silent about intending to make judges liable for damages in actions filed in courts of concurrent jurisdiction (or, for that matter, inferior jurisdiction if Plaintiffs get around to filing an action in the Circuit Court against judges of the Court of Appeals and Supreme Court for not granting extraordinary writs).

It is axiomatic that Missouri courts strictly construe a statute when existing common law rights are affected, *Estate of Parker,* 25 S.W. 3d 611, 615 (Mo. App. 2000). In construing a statute, "common law rules are not changed except by the express terms of a statute or by necessary implication." *N.E. & R. Partnership v. Stone*, 745 S.W. 2d 266, 267-268 (Mo. App. 1988). In that regard repeals of the common law by implication are not favored, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 437 (1907). Consequently, the "common law . . . ought not to be deemed repealed, unless the language of a statute be *clear and explicit for this purpose." Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. Of Virginia*, 464 U.S. 30, 35 (1983) (emphasis added).[4]

This point is illustrated in the context of judicial immunity by *Pierson v. Ray, supra.* In that case the plaintiffs sued a state judge in Mississippi, claiming that he violated their rights guaranteed under the United

[4] Although *Norfolk Redevelopment* is not a Missouri case, it was cited with approval in *N.E. & R. Partnership, supra,* 745 S.W. 2d at 268.

States Constitution. Specifically, they argued that judicial immunity was abrogated by Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides in relevant part as follows:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

(Emphasis added.) Plaintiffs in *Pierson* argued that this language was so broad as to sweep judges in its ambit. The Supreme Court rejected that argument:

> We do not believe that this settled principle of law [judicial immunity] was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

386 U.S. at 554-555.

*Tenney v. Brandhove, supra,* cited in *Pierson*, involved an action under what is now 42 U.S.C. § 1983 against a member of the California legislature in which the plaintiff claimed that the "every person" language in § 1983

abrogated the ancient doctrine of legislative immunity.[5] The Supreme Court rejected that kind of facile analysis: "We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983] before us." 341 U.S. at 376.

The Third Circuit relied on *Tenney* in rejecting a § 1983 attack on judicial immunity in *Bauers v. Heisel*, 361 F. 2d 581 (3d Cir. 1966), decided the year before *Pierson, supra,* and cited favorably by the Court in *Pierson,* 386 U.S. at 555 n. 9. In a magisterial opinion Judge Staley applied the same rules of statutory construction embraced by Missouri Courts (and adverted to above) in holding that § 1983 did not abolish judicial immunity:

> [A] statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment. [Citations omitted.] There can be little doubt that the concept of judicial immunity is deeply rooted in Anglo-American law. In *Yates v. Lansing,* 5 Johns, R., (N.Y.) 282, 291 (Sup. Ct. Of Judicature 1810), Chief Justice Kent noted that:
>
> > "It [judicial immunity] is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decision in the English courts,

[5] The doctrine of legislative immunity is actually less venerable than judicial immunity, tracing its lineage to the 17th century, nearly 300 years after recognition of judicial immunity.

> amidst every change of policy, and through every revolution of their government."[6]
>
> His concluding remarks – that the statute there being construed could not be read as impliedly abrogating judicial immunity – are peculiarly applicable here: "Ought such a sacred principle of the common law . . . be subverted without an express declaration to the effect?"

361 F. 2d at 587.

The same thing is true at bar. There is no "clear and explicit" language in §§ 191.656 or 191.657 that expressly abolishes judicial immunity. This Court is not willing to subvert such a sacred principle without an express declaration to that effect, any more than the United States Supreme Court was willing to abrogate the doctrine in the face of § 1983.

A second consideration, not present in *Pierson* and its progeny, compels that conclusion in the instant cause. As the Court noted earlier, the Missouri Constitution does not permit this Court to exercise appellate jurisdiction or superintending control over another circuit court. If this Court were to hold Judge Nixon liable, or enjoin his discovery orders, it would necessarily have to consider the propriety of those orders. That action would constitute an exercise of appellate jurisdiction or superintending control which is vested *exclusively* in the appellate courts of this state by Article V, §§ 3 and 4.

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[6] This very language was cited verbatim by the Missouri Supreme Court in *Stone v. Graves, supra*, 8 Mo. at 150.

Any attempt by the legislature to interfere with the jurisdiction of the Court of Appeals or Supreme Court would be unconstitutional, *State ex rel. City of St. Louis v. Mummert,* 875 S.W. 2d 108, 109 (Mo. *en banc.* 1994). This Court has a duty to place on § 191.656 such a construction as will make it constitutionally valid, and reject a construction that will make it unconstitutional, *State ex rel. Tallen v. Marsh,* 633 S.W. 3d 458, 460 (Mo. App. 1982). This Court is unwilling to construe § 191.656 in such a fashion as to require it to be declared unconstitutional.

One other principle of statutory construction should be noted. It is clear beyond peradventure that this Court must presume that the legislature did not intend absurd or unreasonable results in enacting a statute, *Breeze v. Goldberg,* 595 S.W. 2d 381, 382 (Mo. App. 1980). Plaintiffs' construction of § 191.656 would lead to just such a result. If Plaintiffs are correct, then they could sue members of the Court of Appeals or Supreme Court who disagreed with their interpretation of Missouri law, *Mullis, supra,* 828 F. 2d at 1393. Moreover, once this Court rules against Plaintiffs, successive suits could be filed against this and every successive Court ruling against Plaintiffs, *ad infinitum, Ibid.* n20. This Court will not presume that such an absurd result was intended by enactment of § 161.656.

**Sanctions**

Moore argues that this Court should not sanction him because he acted in good faith and because the Court erred in dismissing this case as to Judge Nixon. The latter ground is wrong for the reasons set out above.

The Court does not accept the "good faith" defense. In his [sic] original Suggestions in Opposition to Judge

Nixon's Motion for Judgment on the pleadings, Plaintiffs cited *Stump v. Sparkman, supra,* a case in which the plaintiffs sued an Indiana judge who ordered the sterilization of a young woman. The plaintiffs claimed that the judge violated the young woman's rights and sought recovery under 42 U.S.C. § 1983. Despite the broad language of § 1983 adverted to above, permitting an action against "every person" who deprives the constitutional rights of another, the Court reaffirmed its earlier holding in *Pierson v. Ray*, that § 1983 did not abolish judicial immunity. Having read *Stump,* Moore had to be aware that his argument, that judicial immunity had been abrogated by a statute that contained no hint of a purpose to abolish such immunity, was wholly without merit. Moore's claim of good faith is unpersuasive.

The Court is also unimpressed by Moore's history of "stealth litigation" in connection with the Longs. In the case at bar, he withheld service of process by concealing the existence of this lawsuit. His conduct in the federal case was similar; to this date, he *still* has not attempted service in that case. Who knows if we have only seen the tip of the iceberg, with dozens of other stealth lawsuits waiting to be unleashed?

Moore's machinations belie any claim of good faith or mere zealous advocacy. They evidence an attitude of indifference to the orderly process of the Courts of this state. The Defendants should not have to bear the expense of Moore's insouciance, and attorney fees are awarded as follows:

| | |
|---|---|
| Walsh and Funeral Directors Services, Inc. | $14,264.80 |
| Nixon | $7,188.01 |

**Miscellaneous**

On December 5, 2001, this Court granted the unopposed Motion to Dismiss of Defendant, Poe & Company Electronic Reporting. At the same time the Court denied the Motion for Judgment on the Pleadings filed by Defendants, Funeral Directors Service, Inc. and Walsh, because the Motion did not conform to Supreme Court Rule 74.04. Previously, the Court had already dismissed this cause as to Defendant, Nixon. On January 23, 2002, Plaintiffs filed their Dismissal Without Prejudice as to all Defendants except Nixon and Poe & Company Electronic Reporting (both of whom had been dismissed previously).

**IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED**, that this cause is DISMISSED without prejudice as to all Defendants except Defendants, Poe & Company Electronic Reporting and W. Stephen Nixon.

**IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED**, that this cause is DISMISSED with prejudice as to Defendants, Poe & Company Electronic Reporting and W. Stephen Nixon, and Judgment is entered in favor of said Defendants and against Plaintiffs.

**IT IS FURTHRE** [sic] **ORDERED** that Plaintiffs' Motion for Temporary Restraining Order, filed on October 4, 2001, is DENIED.

**IT IS FURTHER ORDERED** that Plaintiffs' Motion to Reconsider Order of Dismissal is DENIED.

**IT IS FURTHER ORDERED** that the Motion to Reconsider Sanctions as to Jack C. Terry is SUSTAINED and that portion of this Court's Order of December 28, 2001, finding Mr. Terry to be liable for sanction, is VACATED.

**IT IS FURTHER ORDERED** that the Motion to Reconsider Sanctions as to Albert W.L. Moore, Jr. is DENIED.

**IT IS ORDERED, ADJUDGED, AND DECREED**, that Judgment is entered in favor of Defendants, Cari F. Walsh and Funeral Directors Service, Inc., and against Albert W.L. Moore, Jr. in the sum of $14,264.80. **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Judgment is entered in favor of Defendant, W. Stephen Nixon, and against Albert W.L. Moore, Jr. in the sum of $7,188.01.

Costs of this action are assessed against Plaintiffs.

**IT IS SO ORDERED.**

Dated this 26th day of February, 2002.

/s/ Michael W. Manners
**MICHAEL W. MANNERS,**
**Judge**

I hereby certify that a copy of
the foregoing was mailed this
26th day of February, 2002, to:

Albert W.L. Moore, Jr.,
Attorney for the Plaintiffs
Dennis Owens, Attorney
for Moore
Cari Walsh, Attorney
for Defendants
K. Paul Day, Attorney
for Defendant

D. Walker, Judicial
Administrative Assistant

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**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

**ELGIE L. LONG, SR., et al.,**

**PLAINTIFFS,**

**V.**

**CROSS REPORTING
SERVICE, INC., et al.,**

**DEFENDANT.**

**CASE NO. 01CV205624**

**DIVISION 2**

**ORDER**

On December 28, 2001, this Court entered its Order sustaining the December 10, 2001 Motion for Sanctions, filed by Defendants, Walsh and Funeral Directors Service, Inc. At the time of that Order the Court was unaware of the Motion for Sanctions filed by Defendant, Nixon, on December 11, 2001, because the latter Motion had not yet found its way into the Court's file in this case.

After reviewing Defendant, Nixon's Motion, along with the pleadings filed in this case, it appears that the First Amended Petition filed by Plaintiffs sought to enjoin Judge Nixon from permitting a deposition in another case pending in his division. (The Court takes judicial notice that Judge Nixon is the Judge of Division 5 of the Jackson County Circuit Court.) It is apparently undisputed that the First Amended Petition was filed after Plaintiffs unsuccessfully sought an extraordinary writ from the Missouri Court of Appeals, also seeking to prevent said deposition. In essence, Plaintiffs' First Amended Petition sought to have this Court exercise supervisory jurisdiction over Defendant, Nixon, in how he regulates discovery in his division.

It is a matter of black letter law that:

> Proceedings in one court should not be enjoined by another court where the courts are of equal rank or concurrent jurisdiction, and the court whose proceedings are sought to be enjoined has previously acquired jurisdiction of the parties and the subject matter, or whether the actions of a lower court amount to an usurpation of powers and duties exclusively vested in the court of last resort.

21 C.J.S. *Courts* §191 at 225. The latter source goes on to say that, "a judgment or decree rendered by a court of competent jurisdiction and not void on its face may be modified, annulled, vacated, or set aside by, and only by, the court which rendered it or a court exercising appellate jurisdiction, regardless of how erroneous the order of the court might be." *Ibid.* §192 at 226. Missouri law comports with these principles. *State ex rel. Rimco v. Dowd*, 858 S.W. 2d 307, 309 (Mo. App. 1993). Clearly, this Court lacked the jurisdiction to enjoin Defendant, Nixon's actions even assuming, *arguendo*, that they were erroneous.

Since this Court lacks the jurisdiction to enjoin Defendant, Nixon's discovery orders, it follows that he is also not liable for damages, especially in light of the doctrine of judicial immunity discussed in this Court's Order of November 21, 2001.

At a hearing before this Court on January 23, 2002, counsel for Defendants, Walsh and Funeral Directors Services, Inc., represented – and Plaintiffs did not dispute – that the case before Judge Nixon was eventually dismissed for want of prosecution because Plaintiffs failed to appear for trial. Counsel also represented that Plaintiffs

appealed that dismissal. Perhaps the appeal will resolve whether Defendant, Nixon, erred in his discovery orders, but that matter properly lies in the jurisdiction of the appellate courts, not this Court. In any event it defies credulity to believe that counsel for Plaintiffs truly believed that this Court had the jurisdiction to exercise supervisory authority over Defendant, Nixon.

**IT IS, THEREFORE, ORDERED** that counsel for Plaintiffs, Albert W. L. Moore, Jr., is found to be liable for sanctions to Defendant, Nixon. At the January 23, 2002 hearing, this Court continued the damage hearing on the Sanctions awarded to Defendants, Walsh and Funeral Directors Services, Inc., to a future date. In the interests of judicial economy, the parties are directed to coordinate their efforts so that the damages to be awarded to Defendants, Walsh, Funeral Directors Services, Inc., and Nixon, can all be determined at the same hearing. Counsel for Defendant, Walsh, is directed to coordinate a teleconference with counsel for Mr. Moore, Defendant, Nixon, and the Court's Judicial Administrative Assistant in order to schedule a new date for damages to be awarded on this Court's Orders granting sanctions.

At the hearing on January 23, 2002, the Court raised the question of whether it could consider sanctions as to Jack Terry, co-counsel for Plaintiffs. Unlike Mr. Moore, a review of the file appears to show that, while Mr. Terry's typewritten name appears as co-counsel for Plaintiffs, apparently he did not *sign* any of the pleadings. When the hearing in this case reconvenes, the parties should be prepared to discuss whether Rule 55.03 applies to an attorney who never signs the pleadings upon which sanctions are sought.

**IT IS SO ORDERED.**

Dated this 25th day of January, 2002.

/s/ Michael W. Manners
**MICHAEL W. MANNERS,**
**Judge**

I hereby certify that a copy of the foregoing was mailed this 25th day of January, 2002, to:

Dennis Owens, Attorney for counsel, Albert W.L. Moore, Jr., and Jack C. Terry
Cari Franke Walsh, Attorney for Defendant, Walsh and Funeral Directors Services, Inc.
Mara Cohara, Attorney for Defendant, Nixon

D. Walker, Judicial Administrative Assistant

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT INDEPENDENCE**

**ELGIE L. LONG, SR., et al.,**

**PLAINTIFFS,**

**V.**

**CROSS REPORTING SERVICE, INC., et al.,**

**DEFENDANTS.**

**CASE NO. 01CV205624**

**DIVISION 2**

**ORDER**

It appears that Plaintiffs have chosen to initiate a cause of action against a Judge of this Court and the attorneys in another action because of their dissatisfaction with the course of discovery in that action. Plaintiffs have failed to show any cognizable basis for their claim at bar as to Defendants, Walsh and Funeral Directors Service, Inc. To permit parties to seek damages because of the conduct of counsel in a collateral proceeding, simply because the [sic] are unhappy with the outcome of that proceeding, would fundamentally subvert justice.

**IT IS THEREFORE ORDERED**, that counsel for Plaintiffs, Albert W. L. Moore, Jack and Jack C. Terry, are found to be liable for sanctions to Defendants, Walsh and Funeral Directors Service, Inc. Before imposing the penalty permitted by Rule 55.03(c), counsel for Defendants are directed to notice up [sic] a hearing at which this Court will hear evidence as to the amount of sanctions awarded pursuant to Rule 55.03(c)(2), including the amount of attorney fees incurred by said Defendants.

**IT IS SO ORDERED.**

Dated this 28th day of December, 2001.

/s/ Michael W. Manners
**MICHAEL W. MANNERS,**
**Judge**

I hereby certify that a copy of the foregoing was mailed this 28th day of December, 2001, to:

Albert W.L. Moore, Jr., Attorney for the Plaintiffs
Cari Walsh, Attorney for Defendants, Cari Franke Walsh and FDS, Inc.
Jack C. Terry

D. Walker, Judicial Administrative Assistant

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT INDEPENDENCE**

**ELGIE L. LONG, SR., et al.,**

**PLAINTIFFS,**

**V.**

**CROSS REPORTING SERVICE INC., et al.,**

**DEFENDANTS.**

**CASE NO. 01CV205624**

**DIVISION 2**

**ORDER**

There are two pending motions before the Court that are ripe for decision.

On October 25, 2001, Defendant, Poe & Company Electronic Reporting, filed a Motion to Dismiss. Plaintiff has not responded to that Motion per Local Rule 33.5.1. Perhaps that failure is a consequence of the fact that the First Amended Petition wholly fails to allege any specific act that Poe & Company Electronic Reporting has done. In any event since Plaintiffs do not oppose said Motion, it is **SUSTAINED**, and Plaintiffs' First Amended Petition is **DISMISSED** as to Defendant, Poe & Company Electronic Recording.

Defendants, Walsh and Funeral Directors Service, Inc., have filed a Motion for Judgment on the Pleadings, asserting that Plaintiffs' First Amended Petition must be dismissed for mootness, estoppel, *res judicata*, and lack of subject matter jurisdiction. In support of their Motion, said Defendants cite various events that have occurred in another case formerly pending in this Court, *viz.*, *Long v. Funeral Directors Service, Inc., et al.*, CV97-26985. They

also cite what is apparently *yet another* lawsuit the same Plaintiffs have filed in the United States District Court for the Western District of Missouri. The efforts of Plaintiffs to file multiple lawsuits may well give rise to liability for their counsel under Supreme Court Rule 55.03 and Rule 11, F.R.Civ.P., but the Court cannot grant Defendants' Motion in its present form.

Rule 55.27(b) allows any party to move for judgment on the pleadings. The rule further provides that if such motion refers to matters outside the pleadings, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04. . . ." This includes cases, such as the one at bar, where the Motion refers to pleadings and orders from prior, related litigation, *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W. 2d 495, 499 (Mo. *en banc.* 1991).

In the instant cause Defendants' Motion refers to matters that occurred in Case No. CV97-26985 and another Federal Court case, something that is outside the scope of Plaintiffs' First Amended Petition. Under those circumstances the Court has no choice but to resolve this matter according to Rule 74.04. By that standard Defendants' Motion is deficient. It does not attach any of the orders or other pleadings in Case No. CV97-26985 or the Federal court case, nor does it include orders or pleadings from the various proceedings in which Plaintiffs have allegedly been rebuffed by the Court of Appeals or the Supreme Court. It also fails to set out paragraphs that establish the existence of undisputed facts, Rule 74.04(c).

Where a motion, such as the one at bar, refers to matters that are *dehors* the petition, and it does not

conform to Rule 74.04, the better practice is to require the movant to refile the motion so that it strictly conforms to Rule 74.04. *Gladis v. Rooney*, 999 S.W. 2d 288, 289 (Mo. App. 1999); *Turner Engineering, Inc. v. 149/155 Weldon Parkway, L.L.C.*, 40 S.W. 3d 406, 408 (Mo. App. 2001). That is what the Court is going to do at bar.

**IT** [sic], **HEREBY, ORDERED** that the Motion of Defendants, Walsh and Funeral Directors Service, Inc., is **DENIED** without prejudice to their right to refile said Motion in conformity with Rule 74.04.

**IT IS SO ORDERED.**

Dated this 5th day of December, 2001.

/s/ Michael W. Manners
**MICHAEL W. MANNERS,**
**Judge**

I hereby certify that a copy of the foregoing was mailed this 5th day of December, 2001, to:

Albert W.L. Moore, Jr., Attorney for the Plaintiffs
Jack C. Terry, Attorney for the Plaintiffs
Brian Madden, Attorney for Defendant, Nixon
Cari Walsh, Attorney for Defendant, Funeral Directors Service, Inc.
Wally Bley, Attorney for Defendant, Poe & Company Electronic Recording

D. Walker, Judicial Administrative Assistant

**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

ELGIE L. LONG, SR., et al.,

Plaintiffs,

v.

CROSS REPORTING SERVICE, INC., et al.,

Defendants.

01CV205624

Division 2

**ORDER**

The Court this day takes up Defendant Honorable W. Stephen Nixon's Motion for Judgment on the Pleadings, filed November 6, 2001. The Court also considers the suggestions relating to the Motion. Now, for good cause shown and being fully advised in the premises, the Court GRANTS the Motion.

Generally, judges acting within their official capacity are immune from civil liability. *Nelson v. McDaniel*, 865 S.W.2d 747, 748 (Mo.App. W.D. 1993). Should a judge possess subject matter jurisdiction, the judge is immune even for those acts which exceed his or her authority. *Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo. banc 1986).

In this case, Plaintiffs seek damages against the Honorable W. Stephen Nixon for his resolution of a discovery issue in an another case. CV97-26985. Plaintiffs, however, admit to the fact that Judge Nixon had subject matter jurisdiction in this case. As Defendants

point out, the Petition reads that in the above-mentioned suit Judge Nixon "failed and refused to enforce" various discovery provisions of the Revised Missouri Statutes. That he failed and refused to enforce those rules necessarily assumes that Judge Nixon had the power to do so. It follows that then that Judge Nixon had jurisdiction over CV97-26985. According to *Raack*, he, therefore, cannot be held liable for his decisions in that case, regardless of whether or not they were correct. Even if the Court were to examine those decisions, it is doubtful that any impropriety would be found, considering the fact that the Missouri Court of Appeals and the Supreme Court denied writs on the matter.

The Court finds that Defendant Judge Nixon is immune from this suit. Therefore, for good cause shown, the Court grants Defendant's Motion for Judgment on the Pleadings. IT IS HEREBY ORDERED that the case against is dismissed as it pertains to Defendant Judge Nixon.

/s/ Michael W. Manners
MICHAEL W. MANNERS
JUDGE, DIVISION TWO

Dated: Nov. 21, 2001

I hereby certify that copies of the foregoing were sent by U.S. Mail this 21st day of Nov., 2001 to the following:

Brian Madden, Esq.
Mara Cohara, Esq.
2345 Grand Blvd.
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317 W. Kansas
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Cari Franke Walsh, Esq.
911 Main Street, 21st Floor
Kansas City, Missouri 64105-5330

Jack Grate, Esq.
14801 E. 42nd Street
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Rhonda Loeppke, Esq.
19401 E. 40 Hwy., Ste. 145
Independence, Missouri 64055

Jose M. Bautista, Law Clerk for Division Two

**In the Supreme Court of Missouri**

SC85221
WD61272

May Session, 2003

Elgie L. Long, Sr., et al.,
Appellants,

vs. (TRANSFER)

Cross Reporting Service,
Inc., et al.,
Defendants,

Funeral Directors Service,
Inc., et al.,
Respondents.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

**STATE OF MISSOURI-Sct.**

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2003, and on the 27th day of May, 2003, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of May, 2003

/s/ Thomas F. Simon Clerk

D.C.

## UNITED STATES CONSTITUTION

### AMENDMENT [I]

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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## UNITED STATES CONSTITUTION

### AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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## UNITED STATES CONSTITUTION

### AMENDMENT [VIII.]

Excessive bail, fines, punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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## UNITED STATES CONSTITUTION

### AMENDMENT [XIV.]

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## UNITED STATES CODE

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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Missouri Revised Statute
§ 1.090. **Words and phrases, how construed. –**

Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

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Missouri Revised Statutes
§ 191.650 **Definitions. –**

As used in sections 191.650 to 191.698 the following terms mean:

(1) "Disclose", to disclose, to release, transfer, disseminate or otherwise communicate all or any part of any record orally, in writing, or by electronic means to any person or entity;

(2) "HBV", the hepatitis B virus;

(3) "Health care facilities", those licensed under chapters 197, RSMo, and 198, RSMo;

(4) "Health care professional", a member of the professional groups regulated by chapters 330, RSMo, 332, RSMo, and 335, RSMo, and sections 334.010 to 334.210, RSMo;

(5) "HIV", the human immunodeficiency virus that causes acquired immunodeficiency syndrome;

(6) "HIV infection", the pathological state of the human body in response to HIV;

(7) "HIV sampling", taking or ordering the taking of any biological specimen from an individual for the purpose of subjecting such specimen to analysis to determine the presence of HIV or infection;

(8) "HIV testing", performing a serological test or other tests upon a biological specimen to determine the presence of HIV or its antibodies in the specimen following HIV sampling;

(9) "Invasive procedures", those surgical or obstetric procedures that involve surgical entry into tissues, cavities, or organs and dental procedures involving manipulation, cutting, or removal of oral or perioral tissues, including tooth structure. Routine health care procedures such as physical examinations, blood pressure checks, eye examination, or oral, rectal or vaginal examinations are not considered as invasive procedures;

(10) "Person", private individuals and private and public bodies politic and corporate, partnerships, trusts,

and unincorporated associations and their officers, directors, agents or employees.

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Missouri Revised Statutes
§ 191.656 **Confidentiality of reports and records, exceptions - violation, civil action for injunction, damages, costs and attorney fees - health care provider participating in judicial proceeding, immune from civil liability.-**

1. (1) All information known to, and records containing any information held or maintained by, any person, or by any agency, department, or political subdivision of the state concerning an individual's HIV infection status or the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed except to:

(a) Public employees within the agency, department, or political subdivision who need to know to perform their public duties;

(b) Public employees of other agencies, departments, or political subdivisions who need to know to perform their public duties;

(c) Peace officers, as defined in section 590.100, RSMo, the attorney general or any assistant attorneys general acting on his or her behalf, as defined in chapter 27, RSMo, and prosecuting attorneys or circuit attorneys as defined in chapter 56, RSMo, and pursuant to section 191.657;

(d) Prosecuting attorneys or circuit attorneys as defined in chapter 56, RSMo, to prosecute cases pursuant

to section 191.677 or 567.020, RSMo. Prosecuting attorneys or circuit attorneys who obtain from the department of health and senior services the contact information and test results of individuals with whom the HIV-infected individual has had sexual intercourse or deviate sexual intercourse. Any prosecuting attorney or circuit attorney who receives information from the department of health and senior services pursuant to the provisions of this section shall use such information only for investigative prosecutorial purposes and such information shall be considered strictly confidential and shall only be released as authorized by this section;

(e) Persons other than public employees who are entrusted with the regular care of those under the care and custody of a state agency, including but not limited to operators of day care facilities, group homes, residential care facilities and adoptive or foster parents;

(f) As authorized by subsection 2 of this section;

(g) Victims of any sexual offense defined in chapter 566, RSMo, which includes sexual intercourse of deviate sexual intercourse, as an element of the crime or to a victim of a section 566.135, RSMo, offense, in which the court, for good cause shown, orders the defendant to be tested for HIV, hepatitis B, hepatitis C, syphilis, gonorrhea, or chlamydia, once the charge is filed.

Prosecuting attorneys or circuit attorneys, or the department of health and senior services may release information to such victims;

(h) Any individual who has tested positive or false positive to HIV, hepatitis B, hepatitis C, syphilis, gonorrhea, or chlamydia, may request copies of any and all tests results relating to said infections.

(2) Further disclosure by public employees shall be governed by subsections 2 and 3 of this section;

(3) Disclosure by a public employee or any other person in violation of this section may be subject to civil actions brought under subsection 6 of this section, unless otherwise required by chapter 330, 332, 334, or 335, RSMo, pursuant to discipline taken by a state licensing board.

(2). (1) Unless the person acted in bad faith or with conscious disregard, no person shall be liable for violating any duty or right of confidentiality established by law for disclosing the results of an individual's HIV testing:

(a) To the department of health and senior services;

(b) To health care personnel working directly with the infected individual who have a reasonable need to know the results for the purpose of providing direct patient health care;

(c) Pursuant to the written authorization of the subject of the test result or results;

(d) To the spouse of the subject of the test result or results;

(e) To the subject of the test result or results;

(f) To the parent or legal guardian or custodian of the subject of the testing, if he is an unemancipated minor;

(g) To the victim of any sexual offense defined in chapter 566, RSMo, which includes sexual intercourse or deviate sexual intercourse, as an element of the crime or to a victim of a section 566.135, RSMo, offense, in which the court, for good cause shown, orders the defendant to be tested for HIV, B, hepatitis C, syphilis, gonorrhea, or chlamydia, once the charge is filed;

(h) To employees of a state licensing board in the execution of their duties under chapter 330, 332, 334, or 335, RSMo, pursuant to discipline taken by a state licensing board;

The department of health and senior services and its employees shall not be held liable for disclosing an HIV-infected person's HIV status to individuals with whom that person had sexual intercourse or deviate sexual intercourse;

(2) Paragraphs (b) and (d) of subdivision (1) of this subsection shall not be construed in any court to impose any duty on a person to disclose the results of an individual's HIV testing to a spouse or health care professional or other potentially exposed person, parent or guardian;

(3) No person to whom the results of an individual's HIV testing has been disclosed pursuant to paragraphs (b) and (c) of subdivision (1) of this subsection shall further disclose such results; except that prosecuting attorneys or circuit attorneys may disclose such information to defense attorneys defending actions pursuant to section 191.677 or 567.020, RSMo, under the rules of discovery, or jurors or court personnel hearing cases pursuant to section 191.677 or 567.020, RSMo. Such information shall not be used or disclosed for any other purpose;

(4) When the results of HIV testing, disclosed pursuant to paragraph (b) of subdivision (1) of this subsection, are included in the medical record of the patient who is subject to the test, the inclusion is not a disclosure for purposes of such paragraph so long as such medical record is afforded the same confidentiality protection afforded other medical records.

3. All communications between the subject of HIV testing and a physician, hospital, or other person authorized by the department of health and senior services who performs or conducts HIV sampling shall be privileged communications.

4. The identity of any individual participating in a research project approved by an institutional review board shall not be reported to the department of health and senior services by the physician conducting the research project.

5. The subject of HIV testing who is found to have HIV infection and is aware of his or her HIV status shall disclose such information to any health care professional from whom such person receives health care services. Said notification shall be made prior to receiving services from such health care professional if the HIV-infected person is medically capable of conveying that information or as soon as he or she becomes capable of conveying that information.

6. Any individual aggrieved by a violation of this section or regulations promulgated by the department of health and senior services may bring a civil action for damages. If it is found in a civil action that:

(1) A person has negligently violated this section, the person is liable, for each violation, for:

(a) The greater of actual damages or liquidated damages of one thousand dollars; and

(b) Court costs and reasonable attorney's fees incurred by the person bringing the action; and

(c) Such other relief, including injunctive relief, as the court may deem appropriate; or

(2) A person has willfully or intentionally or recklessly violated this section, the person is liable, for each violation, for:

(a) The greater of actual damages or liquidated damages of five thousand dollars; and

(b) Exemplary damages; and

(c) Court costs and reasonable attorney's fees incurred by the person bringing the action; and

(d) Such other relief, including injunctive relief, as the court may deem appropriate.

7. No civil liability shall accrue to any health care provider as a result of making a good faith report to the department of health and senior services about a person reasonably believed to be infected with HIV, or cooperating in good faith with the department in an investigation determining whether a court order directing an individual to undergo HIV testing will be sought, or in participating in good faith in any judicial proceeding resulting from such a report or investigations; and any person making such a report, or cooperating with such an investigation or participating in such a judicial proceeding, shall be

immune from civil liability as a result of such actions so long as taken in good faith.

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Missouri Revised Statutes
§ 191.657. **Disclosure of confidential HIV information, by court order, only to certain persons, procedure, when. –**

1. No court shall issue an order for the disclosure of confidential HIV-related information, except a court of record of competent jurisdiction in accordance with the provisions of this section.

2. Pursuant to section 191.656, a court may grant an order for disclosure of confidential HIV-related information to peace officers, the attorney general or any assistant attorneys general acting on his or her behalf, and prosecuting attorneys upon an application showing:

(1) A compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding;

(2) A clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains;

(3) Upon application of a state, county or local health officer, a clear and imminent danger to the public health; or

(4) That the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this section.

3. Upon receiving an application for an order authorizing disclosure pursuant to this section, the court shall enter an order directing that all pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon, be sealed and not made available to any person, except to the extent necessary to conduct any proceedings in connection with the determination of whether to grant or deny the application, including any appeal. Such an order shall further direct that all subsequent proceedings in connection with the application shall be conducted in camera, and, where appropriate to prevent the unauthorized disclosure of confidential HIV-related information, that any pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon not state the name of the individual concerning whom confidential HIV-related information is sought.

4. (1) The individual concerning whom confidential HIV-related information is sought and any person holding records concerning confidential HIV-related information from whom disclosure is sought shall be given adequate notice of such application in a manner which will not disclose to any other person the identity of the individual, and shall be afforded an opportunity to file a written response to the application, or to appear in person for the limited purpose of providing evidence on the statutory criteria for the issuance of an order pursuant to this section.

(2) The court may grant an order without such notice and opportunity to be heard, where an ex parte application by a state, county, or local health officer shows that a clear and imminent danger to an individual, whose life or

health may unknowingly be at risk, requires an immediate order.

(3) Service of a subpoena shall not be subject to this subdivision.

5. In assessing compelling need and clear and imminent danger, the court shall provide written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports each finding, and shall weigh the need for disclosure against the privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination.

6. An order authorizing disclosure of confidential HIV-related information shall:

(1) Limit disclosure to that information which is necessary to fulfill the purpose for which the order is granted; and

(2) Limit disclosure to those persons whose need for the information is the basis for the order, and specifically prohibit redisclosure by such persons to any other persons, whether or not they are parties to the action; and

(3) To the extent possible consistent with this section, conform to the provisions of this section; and

(4) Include such other measures as the court deems necessary to limit any disclosures not authorized by its order.